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No. 98-1161

In The

Supreme Court of the United States

CITY OF ERIE,

Petitioner,

v.

PAP'S A.M.,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* BILL CONTE, ON BEHALF OF *THE DANTE PROJECT: INFERNO* AND THE NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION, IN SUPPORT OF PAP'S A.M.

JACK R. BURNS
Counsel Of Record
JACK R. BURNS, P.S.
400-108th Ave. N.E., Suite 420
Bellevue, WA 98004
(425) 646-6344

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MOTION FOR LEAVE TO FILE *AMICI* BRIEF

Bill Conte, on behalf of *The Dante Project: Inferno*, and The National Campaign for Freedom of Expression seek leave of this Honorable Court to file an *amicus curiae* brief in support of Pap's A.M. The *Amici* brief in support of PAP'S A.M. is filed with permission of the Respondent. The Petitioner has not consented to the filing of the brief.

INTEREST OF *AMICI CURIAE*

Bill Conte is the Translator/Director of a theatrical production entitled *The Dante Project: Inferno*, which is based on the *Inferno* of 14th-century poet, Dante Alighieri.

Universally regarded as one of the greatest artistic achievements of the millennium, Dante's *Inferno* has been an inexhaustible source of inspiration for artists working in every field, especially in sculpture and painting. In translating the work faithfully from its original poetic source to these other media, painters and sculptors traditionally and invariably depict the damned as being naked. This is based on the graphic descriptions in the poem. To emphasize the brutishness, vulnerability, and humiliation of the damned souls in hell, Dante pointedly refers to their being completely exposed to the elements, the torment of demons, and the scrutiny of himself and Virgil, his guide.

The Dante Project: Inferno plans to open off-Broadway in New York City in the fall of 2000. There will be eight performances per week, with matinees on Wednesdays and Sundays and, with the success of the production,

tours nationally and internationally. *Amicus* Conte intends to present *The Dante Project: Inferno*, to the widest possible audience in a manner that makes Dante's words spring to life. The outcome of this case will have an impact on the production.

As with every other image and theatrical effect in the production, the source is Dante himself. As described in the poem, the damned souls are in constant motion. This movement must be choreographed in accordance with the poetic descriptions of Dante. Under any construction, the actors will be "[appearing] in a state of nudity," as proscribed by Erie Ordinance No. 75-1994.

If the "damned" are not allowed to appear "naked," the audience will be deprived of an integral component of Dante's vision. Bereft of this expressive element, shorn of any hint of eroticism, the production will fail to capture the depth and complexity of Dante's thoughts, thereby doing disservice both to the Poet, as well as the theater-going public, which expect no less than thought-for-thought fidelity in any work of art purporting to be a legitimate theatrical translation of Dante's *Inferno*.

The National Campaign for Freedom of Expression is an educational and advocacy network of artists, arts organizations, audience members and concerned citizens formed to protect and extend freedom of artistic expression and fight censorship throughout the United States. The Campaign's work reflects the understanding that true democracy is dependent on the right to free expression for all. The National Campaign for Freedom of Expression is the only nationwide organization exclusively dedicated to challenging the erosion of First

Amendment rights as applied to the support, presentation and creation of the arts in our culture today.

Nudity has been an appreciated and legitimized subject of artistic expression for thousands of years. All of the classical civilizations represented naked male and female bodies in their art works. From the great ancient art of Asia, Africa and South America through the classical works of the European masters to contemporary North American and other global artists, nudity has been a constant. The law governing artistic expression acknowledges the important and historical role of nudity.

If the Erie Ordinance is upheld, it will create precedent for similar legislation throughout the country that will result in the censorship of serious artistic theatrical productions.

CONCLUSION

Amici respectfully request this Honorable Court to grant them leave to file this *amicus curiae* brief in support of Pap's A.M.

Respectfully submitted,

Jack R. Burns, WSBA #01590
Counsel for *Amici Curiae*

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

1. Nudity, A Medium For Communicating Various Messages, Has A Long History In The Performing Arts 6

2. What Is Exotic Dance? 10

3. Without Nudity, The Intended Messages Of Exotic Dance Are Substantially Changed 12

4. Because The City of Erie Ordinance Bans All Expressive Nudity, It Is Unconstitutionally Overbroad 15

   A. The Ordinance 15

   B. The Overbreadth Doctrine 17

   C. Application Of The Overbreadth Doctrine 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 14, 20, 21, 22, 23

Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 18

Boos v. Berry, 485 U.S. 312 (1988)..... 20

Broadrick v. Oklahoma, 413 U.S. 601 (1963) 17, 18

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 18

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 18

City of Lakewoo[illegible] Plain Dealer Publishing Co., 486 U.S. 750 (19[illegible] 24

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 17

Dombrowski v. Pfister, 380 U.S. 479 (1965)..... 18

Forsyth County, GA v. Nationalist Movement, 505 U.S. 123 (1992) 24, 25

Houston v. Hill, 482 U.S. 451 (1987) 18

NAACP v. Button, 371 U.S. 415 (1963)..... 18

New York v. Ferber, 458 U.S. 747 (1982) 23

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 22

U.S. v. O'Brien, 391 U.S. 367 (1968) 24

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Robert Clyde Allen, *Horrible Prettiness: Burlesque and American Culture*, Chapel Hill: University of North Carolina, 1991 .....6, 8

Jack Anderson, "Reverently Naked for Rites in Church," *New York Times*, October 7, 1997..... 10

Mary Ellen Roach and Joanne Bubloz, eds. *Dress, Adornment, and the Social Order*. New York: Wiley, 1965..... 13

Meiling Chen, "Les Demoiselles d/L.A.: Sacred Naked Nature Girls' Untitled Flesh," *The Drama Review* 42 Summer 1998 13

Ann Corio, *This was Burlesque*. New York: Grossett & Dunlap, 1968 8

Timothy Gilfoyle, *City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790-1920*, New York: W.W. Norton & Co., 1992 7

Judith Lynne Hanna, *Dance, Sex and Gender: Signs of Identity, Dominance, Defiance, and Desire*. Chicago: University of Chicago Press, 1988..... 8

Judith Lynne Hanna, *To Dance Is Human: A Theory of Nonverbal Communication*. Chicago: University of Chicago Press, 1987..... 10

Judith Lynne Hanna, "Toying with the Striptease Dancer and the First Amendment," Stuart Reifel, ed. *Play & Culture Studies*, Vol. 2: *Play Contexts Revisited*. Stamford, Ct: Ablex Publishing Corporation, 1999 11

TABLE OF AUTHORITIES -- Continued

Page

Judith Lynne Hanna, "Undressing the First Amendment and Corsetting the Striptease Dancer," *The Drama Review* 42 Summer 1998 ..... 11, 13, 14

Lucinda Jarrett, *Stripping in Time: A History of Erotic Dancing*. London: Pandora, 1997 8

Richard A. Posner, *Sex and Reason*, (Harvard University Press, 1992) 20

Richard Schechner, *Environmental Theater*. New York: Applause, 1994 12

Rebecca Schneider, *The Explicit Body in Performance*. New York: Routledge, 1997 12

Francis Sparshott, *A Measured Pace: Toward a Philosophical Understanding of the Arts of Dance*. Toronto: University of Toronto Press, 1995 12

Francis Sparshott, *"Some Aspects of Nudity in Theater Dance."* Dance Chronicle 18(2) 13

Karl Toepfer, "Nudity and textuality in Postmodern Performance." *Performing Arts Journal*. No. 54:76-91, September 1, 1996 13

Webster's Ninth New Collegiate Dictionary, Springfield, MA: Merriam-Webster Inc., 1987 10

INTEREST OF *AMICI CURIAE*[1]

Bill Conte is the Translator/Director of a theatrical production entitled *The Dante Project: Inferno*, which is based on the *Inferno* of 14th-century poet, Dante Alighieri.[2]

Universally regarded as one of the greatest artistic achievements of the millennium, Dante's *Inferno* has been an inexhaustible source of inspiration for artists working in every field, especially in sculpture and painting. In translating the work faithfully from its original poetic source to these other media, painters and sculptors traditionally and invariably depict the damned as being naked. This is based on the graphic descriptions in the poem. To emphasize the brutishness, vulnerability, and humiliation of the damned souls in hell, Dante pointedly refers to their being completely exposed to the elements, the torment of demons, and the scrutiny of himself and Virgil, his guide.

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici* discloses that he authored this brief with the assistance of Judith Lynne Hanna, Ph.D. Dr. Hanna is a cultural anthropologist; Senior Research Scholar, Department of Dance, University of Maryland; and educator. She has authored five substantial books on dance and over eighty-seven (87) articles on dance in peer reviewed scholarly journals. Funding for the preparation and submission of this brief was provided by Consolidated Bookkeeping & Management Services, Inc., Seattle, Washington.

[2] Amicus Conte is a freelance actor, director, playwright and lecturer in the Department of English, Speech and World Literature at the College of Staten Island (CUNY) and in the Department of Humanities at St. John's University.

The Dante Project: Inferno plans to open off-Broadway in New York City in the fall of 2000. There will be eight performances per week, with matinees on Wednesdays and Sundays and, with the success of the production, tours nationally and internationally. *Amicus* Conte intends to present *The Dante Project: Inferno*, to the widest possible audience in a manner that makes Dante's words spring to life. The outcome of this case will have an impact on the production.

As with every other image and theatrical effect in the production, the source is Dante himself. As described in the poem, the damned souls are in constant motion. This movement must be choreographed in accordance with the poetic descriptions of Dante. Under any construction, the actors will be "[appearing] in a state of nudity," as proscribed by Erie Ordinance No. 75-1994. If the "damned" are not allowed to appear "naked," the audience will be deprived of an integral component of Dante's vision. Bereft of this expressive element, shorn of any hint of eroticism, the production will fail to capture the depth and complexity of Dante's thoughts, thereby doing disservice both to the Poet, as well as the theater-going public in New York, which expect no less than thought-for-thought fidelity in any work of art purporting to be a legitimate theatrical translation of Dante's *Inferno*.

The National Campaign for Freedom of Expression is an educational and advocacy network of artists, arts organizations, audience members and concerned citizens formed to protect and extend freedom of artistic expression and fight censorship throughout the United States. The Campaign's work reflects the understanding that

true democracy is dependent on the right to free expression for all. The National Campaign for Freedom of Expression is the only nationwide organization exclusively dedicated to challenging the erosion of First Amendment rights as applied to the support, presentation and creation of the arts in our culture today.

Nudity has been an appreciated and legitimized subject of artistic expression for thousands of years. All of the classical civilizations represented naked male and female bodies in their art works. From the great ancient art of Asia, Africa and South America through the classical works of the European masters to contemporary North American and other global artists, nudity has been a constant. The law governing artistic expression acknowledges the important and historical role of nudity.

If the Erie Ordinance is upheld, it will create precedent for similar legislation throughout the country that will result in the censorship of serious artistic theatrical productions. Amici urge this Court to affirm the decision of the Pennsylvania Supreme Court. Any other decision will vest government officials with the unfettered power to censor non-obscene productions containing nudity, no matter how important that nudity is to the messages of the production.

SUMMARY OF ARGUMENT

Nudity has a long history in the performing arts in this country. Early concerns focused on exposure of the ankle, loose fitting clothing, the length of skirts and exposure of the female leg. With the coming of the 20th

century, full nudity began to be used in mainstream theater dance. In the first three decades of the 20th century, the famous American modern dancer Isadora Duncan established nudity, or near-nudity, as important to her art. In addition, moving nude dancers appeared in Florenz Ziegfeld's popular revues in New York City. Topless dancers were on the scene by 1945.

Contemporary exotic dance is an outgrowth of these important 20th century developments in theater.

Dance is purposeful, rhythmical and culturally influenced sequences of nonverbal body movements. As an art form, dance requires learned skill, imagination, and communication. "Exotic dance," the expressive conduct targeted by Ordinance No. 75-1994, is a form of dance and a form of art with its own style and aesthetic.

An exotic dancer attempts to communicate to patrons through the senses of body movement, proximity and verbalization, an illusion of intimacy, spontaneity and emotion. By creating an illusion of concern and availability for a patron, the exotic dancer seeks, theatrically, to effect a transformation in the patron's feelings. The predominant characteristic distinguishing exotic dance from other forms of dance is the use of nudity to deliver the messages of the dance.

Recent research demonstrates that nudity significantly enhances the intended messages of exotic dance. Without nudity, the messages of the dance are substantially changed. The research reveals that men judge a nude dancer to be communicating a different message than a clothed dancer.

The "overbreadth doctrine" prohibits a statute from making innocent or constitutionally protected conduct criminal. The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.

Section 1(c) of Ordinance No. 75-1994 prohibits any nudity in the performing arts, including exotic dance. In addition, it prohibits certain costumes intended to convey representational messages. Because the Erie ordinance prohibits nudity, and the representation of nudity, in all live performances, including those with serious literary, artistic, or political value, it is unconstitutionally overbroad.

The overbreadth of the regulation here is both real and substantial. Erie's ban on nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes; i.e., nudity used as a communicative medium in operas, ballet, plays, musicals and other serious artistic performances. The potential impermissible applications of Section 1(c) dwarf whatever the legitimate reach of the regulation may be.

Because the State courts have refused to render a narrowing construction, and it is not within the power of this Court to do so, the decision of the Pennsylvania Supreme Court should be **AFFIRMED**.

ARGUMENT

1. Nudity, A Medium For Communicating Various Messages, Has A Long History In The Performing Arts.

"Nudity" has a long history in the performing arts in this country, both as to its use and its meaning.

In the 1820's, public debates over nudity focused on the length of ballet dancers' costumes. At that time, a leg was called a limb, and it was covered, even for sunbathing and swimming.

In 1827 citizens railed against the French ballet dancer, Madame Francisque Hutin, for the "public exposure of a naked female."[3] She wore a long silk skirt covering loose trousers fastened at the ankle. A glimpse of a loose trouser-clad thigh when the dancer pirouetted and her skirt flew up was equated with total nudity – yet not an inch of skin beneath the waist showed.[4]

It was not until the 1840's that the social status of ballet dancers was elevated. Ballet dancers' skirt lengths had been shortening, but coming from France, dancer Fanny Elssler anticipated American conservatism and lengthened her costume by a full foot. Her successful debut in the U.S. marked the acceptance by upper-class audiences of ballet as "art."[5] This helped expand the boundaries for the use of the partially-revealed female

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[3] Robert Clyde Allen, *Horrible Prettiness: Burlesque and American Culture*. Chapel Hill: University of North Carolina, 1991, pp. 88-89.

[4] *Id.*

[5] *Id.*, 90-91.

form in the performing arts and provided a rationalization for pleasure in viewing ballet.

The 1865 stage spectacle, "The Black Crook," popularized ballet. It had a large number of female legs, that is, "undressed" dancers with close-fitting pantaloons stopping at mid thigh, sleeveless bodices and short skirts, all considered "nudities."[6]

The 1893 Chicago World's Columbian Exposition revealed even more female anatomy. "Streets of Cairo" and Algerian and Persian village exhibits featured, for the first time in public, the dance called *danse du ventre*, cootch, hootchy-kootchy, and "belly dance" – a forerunner of contemporary exotic dance. While American women wore corsets under long dresses, the performers wore baggy trousers and midriff-length tops over an uncorsetted body.[7]

Full nudity first appeared in the 1840's theatrical *tableaux vivants*. Performers posed as "classical nudes" on revolving turntable stages that allowed "more revealing" views.[8] The "living statues" slightly changed positions.

Moving nude dancers in popular art appeared from 1912-1929 in Florenz Ziegfeld's revues in New York City.

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[6] *Id.*, 108-111.

[7] *Id.*, 225-226.

[8] Timothy Gilfoyle, *City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790-1920*. New York: W.W. Norton & Co., 1992, p. 127.

Flirting with naughtiness, many of the revues presented feminine nudity veiled.[9]

While unembellished nudity was still taboo during the early part of this century, dancers used gimmicks to give the illusion of nudity, such as a g-string with glued pubic hair, or they delivered quick intimate glimpses of body parts in flashes. For example, in the 1930s, Sally Rand covered and fleetingly exposed her nudity with two huge ostrich fans.[10]

Topless dancers were on the scene by 1945. Famous strippers included Lili St. Cry, Blaze Starr, Tempest Storm, and Gypsy Rose Lee.[11]

The 20th century saw the fully nude body used in mainstream theatrical dance.[12] In the first three decades of the 20th century, the famous American modern dancer Isadora Duncan established nudity, or near-nudity, as important to her art. "Modern dance" rebelled against the unnaturalness of ballet with its specific codified positions, movements and fitted costumes. Compressing internal organs, women's tightly corseted bodies of the

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[9] Allen, supra, 246; *see also*, Lucinda Jarrett, *Stripping in Time: A History of Erotic Dancing*. London: Pandora, 1997, pp. 108-110.

[10] Ann Corio, *This was Burlesque*. New York: Grossett & Dunlap, 1968, p. 98; Jarrett, supra, p. 150.

[11] Allen, supra; Jarrett, supra.

[12] Judith Lynne Hanna, *Dance, Sex and Gender: Signs of Identity, Dominance, Defiance, and Desire*. Chicago: University of Chicago Press, 1988.

19th century were seen as chastisement, pain, and symbolic of oppression.[13]

More recent landmarks in mainstream theater provide a context for nudity in dance today. Yvonne Rainer's "Trio A," performed in 1966 in New York City, showed nude dancers with American flags hanging from their necks in protest against repression and censorship. In Anna Halprin's New York City debut of "Parades and Changes," in April, 1967, modern dancers disrobed. "Hair," a rock musical that opened October 29, 1967, brought nudity, including a glance at pubic hair, to a New York City Broadway theater. The 1969 musical "Oh! Calcutta!" showed female and male frontal nudity and group body contact. The 1970 classical ballet "Mutations," by Glen Tetley and Hans van Manen, showed a nude man dance a slow celebratory solo and a nude couple perform an entwining duet while three nude henchmen moved about. American choreographer Mark Morris presented "Striptease," with its "down to the buff" commentary on hypocrisy in society. Bill T. Jones's modern dance "Last Supper at Uncle Tom's Cabin/The Promised Land," first performed in 1990, featured nudity among an assemblage of up to 50 company and community members – tall and short, fat and thin, black and white, old and young – all devoid of disguise, vulnerable, and unashamed, pulling together against the disparate strains of conflict over race, sexual orientation, gender, poverty and age. The nudity of the all-male modern Creach/Koester Dance Company in its 1998 "Study for a Resurrection," in St. Mark's Church, in New York City, "affirmed the body's

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[13] *Id.*

beauty and vulnerability."[14] "Naked Boys Singing," a 1999 musical review presented at the Actor's Playhouse in Greenwich Village, New York City, poked fun at social behavior.

Contemporary exotic dance is an outgrowth of these important 20th century developments in theater.

2. What Is Exotic Dance?

Dance is purposeful, rhythmical and culturally influenced sequences of nonverbal body movements.[15] As an art form, dance requires learned skill, imagination and communication.[16] "Exotic dance," also called nude, seminude, erotic, striptease or barroom dance, is dance and a performing art with its own style and aesthetic.[17] The roots of contemporary exotic dance are in traditions of middle east dance and burlesque.

In contemporary exotic dance, a dancer initially appears clothed, signifying the social norm. Transgressing this norm, she commonly strips to nudity in the course of her performance.

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[14] Jack Anderson, "Reverently Naked for Rites in Church," *New York Times*, October 7, 1997, p. B3.

[15] Judith Lynne Hanna, *To Dance Is Human: A Theory of Nonverbal Communication*. Chicago: University of Chicago Press, 1987.

[16] *Webster's Ninth New Collegiate Dictionary*, Springfield, MA: Merriam-Webster Inc., 1987, p. 105.

[17] The term "exotic dance" comes from the 1893 Chicago World's Columbian Exposition which featured the "exotic," meaning "the unusual other."

As an actor, an exotic dancer attempts to communicate to patrons through the senses of body movement, proximity and verbalization, an illusion of intimacy, spontaneity and emotion. By creating an illusion of concern and availability for a patron, the exotic dancer seeks, theatrically, to effect a transformation in the patron's feelings.[18]

Notions of artistic merit in exotic dance center on theatricality; i.e., the performer's sensuality, costume and physical disclosure, beauty, personality, friendliness, musicality, creativity, and variety and quality of movement repertoire. Evaluation of a performance is also based on how well it fulfills its communicative purpose.[19]

Exotic dance is usually performed in cabarets generally referred to by municipalities as "adult cabarets." These cabarets have all the indicia of a dinner theater. Similar to dinner theaters, "adult cabarets" have entrance fees, a raised stage on which entertainers perform, table seating surrounding the stage, special lighting and sound

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[18] Judith Lynne Hanna, "Undressing the First Amendment and Corsetting the Striptease Dancer," *The Drama Review* 42, 2(T158):38-69, Summer 1998; Judith Lynne Hanna, "Toying with the Striptease Dancer and the First Amendment," Stuart Reifel, ed. *Play & Culture Studies*, Vol. 2: *Play Contexts Revisited*, Stamford, CT: Ablex Publishing Corporation, 1999, pp. 37-56.

[19] The claim that dance performed in exotic dance clubs is not dance as performed at mainstream theaters is a difference of degree or quality, not a difference of kind. While today, ballet, with its many years of demanding training, may be deemed "high art" by mainstream dance critics, in the 19th century, ballet was commonly considered a disreputable low art. Hanna, "Undressing . . . ," 1998, supra, pp. 48-50.

systems, a separate dressing area and "ushers" to seat the members of the audience and maintain proper decorum. Some "adult cabarets" serve food and drink and have reserved seating areas for patrons paying a premium.

3. Without Nudity, The Intended Messages Of Exotic Dance Are Substantially Changed.

Recognizing that nudity is a key component of exotic dance, it is important to explore the value of nudity as part of the communicative messages of the dance.

In the context of theatrical productions, ballet and modern dance, nudity is used for many different expressive purposes. While, "it is impossible to reduce to a single organizing factor the multitude of associations the naked human body stirs . . . ," "nakedness is a time honored way of showing the body's grace and beauty . . . "[20]

Further, nudity, as an integral and expressive component of dance, may incorporate some or all of the following messages: – natural beauty, eroticism, sensuality, sexuality, fantasy, pretense of sexual availability, emotional and physical intimacy, unbounded and uncomplicated continuous desire, acceptance, tenderness, the jewel of femininity or masculinity, longing, and harmony of sex and gender.[21]

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[20] Richard Schechner, *Environmental Theater*. New York: Applause, 1994, pp. 89-90.

[21] For example, see Rebecca Schneider, *The Explicit Body in Performance*. New York: Routledge, 1997; Francis Sparshott, *A Measured Pace: Toward a Philosophical Understanding of the Arts of*

Additionally, the nude body may be seen as a "portable art gallery constantly on display, subject not only to . . . [one's] own reactions but also to those of others."[22]

Nudity in theater can bear on the historical tension between how the body was revealed in the past and how it is revealed now or how it challenges the status quo.[23] Nudity may also serve as a vehicle to challenge and mock some religious and moral tenets.

Nudity is often used to express something other than eroticism. If the message intended to be conveyed by the use of nudity is the naturalness or beauty of the naked human form, such a message is defeated by covering the body in such a way as to suggest that nudity is not natural or beautiful. If the message signifies defenselessness, vulnerability, or Eden-like innocence, "only complete nudity could make the point; the retention of even a loin cloth would not weaken the effect, but change it into something quite different."[24]

Nudity in exotic dance has a special meaning. Exotic dance reflects the culture of its time and by definition must be "naughty" and go beyond what is seen in public

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Dance. Toronto: University of Toronto Press, 1995; Karl Toepfer, "Nudity and Textuality in Postmodern Performance." *Performing Arts Journal*. No. 54:76-91, September 1, 1996.

[22] Mary Ellen Roach and Joanne Bubloz, eds. *Dress, Adornment, and the Social Order*. New York: Wiley, 1965. p. 13.

[23] Hanna, "Undressing . . . ," 1998, supra; Meiling Chen, "Les Demoiselles d/L.A.: Sacred Naked Nature Girls' Untitled Flesh," *The Drama Review* 42, 2(T158):70-97, Summer 1998.

[24] Francis Sparshott, *"Some Aspects of Nudity in Theater Dance."* Dance Chronicle 18(2), p. 307.

places.[25] The exotic dancer's creation of erotic fantasy through her moving body draws upon nudity as a natural element of theatrical artistry. Nudity theatrically speaks, like an emblem, uniform, or other symbol and emotion.

Given the fact that nudity is regularly used in the performing arts to communicate a particular message, a central question in the evaluation of any regulation banning performance nudity is whether the message conveyed by the nudity, i.e., the content of the performance, is substantially altered. Put another way, does it makes a difference to the patron in the sending and receiving of erotic messages, for example, if a performer or exotic dancer is clothed or nude? Recent research demonstrates that nudity significantly enhances the intended messages of exotic dance.

Psychologist Edward I. Donnerstein's study of exotic dance[26] disproves the conclusion in *Barnes v. Glen Theatre, Inc.* that "the requirement that the dancers don pasties and a g-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."[27] The research demonstrates that nudity, as a component of exotic dance, is essential to the

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[25] Hanna, "Undressing . . . ," 1998, supra; Hanna, "Toying . . . ," 1999 supra.

[26] A 1996 declaration by Dr. Donnerstein describes his research methodology and conclusions. A copy of that declaration is included in the appendix to this brief along with the study report. In addition, it can be found in the records of this court in the Appendix to the Petition for Writ of Certiorari filed by Deja Vu of Nashville, Inc. in Case No. 98-1935.

[27] 501 U.S. 560, 571 (1991).

messages conveyed by such dance. Without it, the intended messages are substantially changed.

The study reveals that men judge nude dancers to be communicating different messages than clothed dancers. Ultimately, the study concludes that a dancer donning pasties and a G-string conveys a significantly different message compared to when she is nude.

4. Because The City of Erie Ordinance Bans All Expressive Nudity, It Is Unconstitutionally Overbroad.

Given the historical perspective of nudity in the performing arts set out above, this Court is asked to review a regulation that bans all performance nudity. The scope of expressive conduct regulated by section 1(c) of Ordinance No. 75-1994 goes far beyond the type of dance thought to produce adverse secondary effects; it prohibits nudity in mainstream artistic productions as well. Because the regulation sweeps too broadly, it must be found unconstitutional.

A. The Ordinance.

The challenge in this case is directed at Section 1(c) of Ordinance 75-1994. Section 1 provides:

> 1. A person who knowingly or intentionally *in a public place*:—
>
> a. engages in sexual intercourse;
>
> b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code;

c. *appears in a state of nudity*, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense. (Emphasis added)

"Nudity" and "public place" are separately defined. In addition to its ordinary meaning, nudity is defined in Section 2 to include:

> . . . the exposure of any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perieueum anal region or pubic hair region; or the exposure of any device worn as cover over the nipples and/or areola of the female breast, which device simulates and give the realistic appearance of nipples and/or areola.

Section 4 defines the term "Public Place" to include all buildings owned by or open to the general public, specifically including *places of entertainment* and *theaters*. (Emphasis added)

On its face, the regulation prohibits any nudity in the performing arts. In addition, it prohibits certain costumes intended to convey a representational message[28] and it

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[28] Under any interpretation of the ordinance, a performer wearing a black body stocking that has material attached to it to realistically simulate the nipple and areola would be "appearing in a state of nudity" and, thus, guilty of a summary offense. Even if a simulation is not realistic, a performer is guilty of a summary offense if their costume gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region. Justice Souter concurred in the judgment in *Barnes*, in part, because nothing short of the

prohibits entertainers from touching themselves in the genital area, even if fully clothed.[29] Because of the excessive sweep of the regulation, it is unconstitutionally overbroad.

B. The Overbreadth Doctrine.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1963). The "overbreadth doctrine" prohibits a statute from making innocent or constitutionally protected conduct criminal. *Id.* at 613; *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct. The loss or substantial impairment of precious

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obscenity laws prohibited a dancer "from expressing an erotic message by articulate speech or representational means." 501 U.S. at 587. Here, even the attempt to represent the state of nudity is prohibited.

[29] While Section 1(d) was not challenged below, it clearly regulates expressive conduct protected by the First Amendment that does not involve nudity. For example, this section would prohibit Michael Jackson's performance in "Thriller," where he grabs his crotch or the routines of many comedians mimicking the antics of professional baseball players adjusting themselves.

First Amendment rights may be critical, since those persons covered by the statutes are bound to limit their behavior to that which is unquestionably safe. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Under the overbreadth doctrine, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.' " *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

While the overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613, a plaintiff may prevail on a facial attack by demonstrating that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . " *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

In the First Amendment context, criminal statutes, such as the one here, must be scrutinized with particular care. "[T]hose that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Houston v. Hill*, 482 U.S. 451, 459 (1987).

C. Application Of The Overbreadth Doctrine

The Erie ordinance prohibits nudity in all live performances, including those with "serious" literary, artistic, or political value. The ordinance contains no limiting provisions and makes no attempt to regulate only those expressive activities that are alleged to cause purportedly harmful secondary effects.[30]

The threshold inquiry for purposes of First Amendment analysis is whether the purpose of the Ordinance is to suppress communication. The preambles to the ordinance plainly state that it was adopted

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

The stated purpose of the ordinance focuses on the negative secondary effects of "nude live entertainment," not the evils, in general, of nudity in the performing arts or

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[30] There is absolutely no evidence in this record linking expressive nudity of the kind portrayed in performances of "Hair," "Bent" and "Equus" with the purported harmful secondary effects of "providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases, and other deleterious effects" targeted by the regulation.

nudity in public places.[31] The ordinance states no moral or practical objection to nudity in and of itself.

Given this explicitly stated purpose, Ordinance No. 75-1994 is not a law of general applicability that only indirectly affects speech. *See, Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991), Scalia, J. concurring. The perceived evil that Erie seeks to address is live adult entertainment. The ordinance specifically targets live nude entertainment because of the perceived "secondary effects" associated with that type of expressive conduct.[32]

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[31] While there is a general "moral disapproval of people appearing in the nude among strangers in public places", this societal disapproval does not apply when the nudity is part of an artistic representation or presentation. As stated by Chief Judge Richard Posner, "the nudity of a flasher and the nudity of an artistic performer are not the same thing . . . the difference, which is independent of the quality of the artistic performance, is [John Stuart] Mill's difference between self-regarding and other-regarding conduct. The flasher thrusts his nudity on an unwilling stranger; the artistic performer sells nudity to willing customers." Posner, Richard A., *Sex and Reason*, pp. 379-380 (Harvard University Press, 1992).

[32] Were the regulation targeted at the persuasive effect of the speech, as seems likely here, it would surely be unconstitutional. In *Boos v. Berry*, 485 U.S. 312, 321 (1988), the court said:

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listener's reactions to speech are not the type of 'secondary effects' we referred to in Renton. To take an example factually close to Renton, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.

Insofar as the ordinance attempts to prohibit, in any kind of performance, costuming that simulates nudity, it is not nudity that is prohibited; rather, it is the idea and representation of nudity that is suppressed. This prohibition is clearly content-based.

Because the purpose of the regulation is to suppress expressive conduct in order to ameliorate the alleged secondary effects caused by live nude entertainment, the regulation must survive an enhanced level of scrutiny which requires the Court to determine whether there is a substantial justification for the proscription. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 578-79 (1991), Scalia, J., concurring.

The Pennsylvania Supreme Court describes the entertainment offered by Pap's A.M. as "nude erotic dancing," 674 A.2d 338, 340 (1996) and as "the same exact variety as the restricted entertainment in *Barnes*." *Id.*, at 344. Presumably, the City intended to include only the kind of live nude entertainment described in *Barnes* since the preambles to the ordinance reflect that it relied upon *Barnes* in passing the ordinance.

Whatever the intent, the sweep of the regulation here goes far beyond the kind of dance described in *Barnes*. The regulation reaches all performance nudity, including that which has not been shown to cause adverse secondary effects. Neither the ordinance itself nor the state

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> The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

courts have limited the application of the ordinance so that it does not apply to the performing arts.

The City of Erie bears the burden of demonstrating a substantial governmental interest justifying the ban on theatrical nudity. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986). There is no evidence in the record here that nudity in productions performed in mainstream theatres can be causally connected to the presumed evils targeted by Erie, whether by mere correlation or by the persuasive effect of the nudity. *See, Barnes*, 501 U.S. at 585-86, Souter, J., concurring. Absent such evidence, the regulation impermissibly burdens a substantial amount of protected speech.

Throughout this litigation, Pap's A.M. has challenged Section 1(c) of ordinance No. 75-1994 as being unconstitutionally overbroad.[33] Had a similar challenge been raised in *Barnes*, it is clear that five (5) members of the Court would have found the statute there unconstitutional. Justice Souter, noting that there was no overbreadth challenge before the court, indicated that the secondary effects rationale on which he relied would be open to question if the statute could be used to bar expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

> It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects.

[33] Pet. App. A at 3a.

Barnes, 501 U.S. at 585 n. 2. The productions Justice Souter would have been loathe to prohibit in *Barnes* fall squarely within the prohibitions of Section 1(c) of Ordinance No. 75-1994.

While a statute is overbroad if it sweeps constitutionally protected expression within its prohibitions, the Court has indicated that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982). *Amici* respectfully submit that the overbreadth of the regulation here is not hypothetical; rather, it is both real and substantial.

Erie's ban on performance nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes; i.e., nudity used as a communicative medium in operas, ballet, plays, musicals and other serious artistic performances. Here, the potential impermissible applications of Section 1(c) dwarf the assertedly legitimate reach of the regulation.

In addition to banning nudity, the regulation prohibits costumes that simulate specified anatomical parts of the human body. Whatever evidence may exist to

demonstrate a correlation between live nude entertainment and adverse secondary effects does not support the conclusion that there is a link between artistic productions which have no nudity, but use costumes that simulate the nude condition, and secondary effects.

From its analysis, it is abundantly clear that the Pennsylvania Supreme Court, like the trial court, found the regulation at issue unconstitutionally overbroad because it reached far more speech than was essential to accomplish the expressed governmental interest in eliminating alleged secondary effects associated with live nude entertainment. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) (the incidental restriction on alleged First Amendment freedoms can be no greater than is "essential"). Consequently, the court severed the portion of the ordinance that brought the performing arts within its regulatory sweep. In doing so, the Court refused to rewrite the ordinance to permit nudity in performances other than "live nude entertainment."[34]

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[34] Throughout this litigation the City has asked the courts to rewrite the ordinance in order to remove its unconstitutional overbreadth. Failing this, the City argues that, in the exercise of its prosecutorial discretion, it would never prosecute mainstream theatrical productions. Joint Appendix 88-89. The City essentially asks this Court to rely on its good judgment that it will not enforce the ordinance against nude entertainment that might appear in the context of a theatrical performance or "serious" dance. The mere existence of discretion is the evil that the overbreadth doctrine seeks to cure. *Forsyth County, GA v. Nationalist Movement*, 505 U.S. 123 (1992); *see also, City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769 (1988) (the face of the ordinance contained no explicit limits on the mayor's discretion). In *Forsyth County*, the Court stated:

> . . . the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so. 505 U.S. at 133, n.10.

Because the Erie ordinance reaches a substantial amount of protected expression and the State courts have refused to render a narrowing construction, it is unconstitutionally overbroad.

CONCLUSION

Section 1(c) of Ordinance No. 75-1994 prohibits nudity in the performing arts, thus effecting the messages and content of "serious" artistic presentations. Because the regulation is targeted at expressive nudity and sweeps a substantial amount of protected expression within its prohibitions, its overbreadth is both real and substantial. As a consequence, the decision of the Pennsylvania Supreme Court should be **AFFIRMED**.

Respectfully submitted,

JACK R. BURNS, WSBA #01590
Counsel for *Amici*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:

STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION	**MDL DOCKET NO. 1031** **ALL CASES** **JUDGE ROBERT L. ECHOLS**

AFFIDAVIT OF DR. EDWARD I. DONNERSTEIN

Dr. Edward I. Donnerstein, under penalty of perjury under the laws of the States of Tennessee and California, declares as follows:

1. I am a Professor of Communication and Psychology at the University of California, Santa Barbara, and am currently Chairperson of the Department of Communication. I was Chairperson of that Department from 1986 to 1991, Vice Chairperson from 1991 until 1994, and once again returned as Chairperson this year.

2. I teach in the areas of the psychological effects of media, mass media policy, policy implications of social science research, and research design, methods and statistics. I have taught these subjects, and particularly the area of research design, since 1972, and my teaching experience has been in Illinois, Iowa, Wisconsin, Canada, Beijing, China, and in California.

3. Although my research and teaching is devoted to a wide variety of areas, I have developed over the years the areas of specialization concerning the study of sexual and/or erotic expression and the effects of such on human behavior, and the effects of violent forms of communication on individuals. My areas of concentration often concern the intersection between psychological theory and research and the law.

4. My expertise in the area of sexual and/or erotic expression has resulted in me serving as a member on the United States Surgeon General's Workshop on Pornography, chaired by then Surgeon General C. Everett Koop during the Reagan administration, and as the lead social science witness to the United States Attorney General's Commission on Pornography chaired by Attorney General Edwin Meese, also during the Reagan administration, which has generally been referred to as the "Meese Commission".

5. I regularly obtain grants for the conducting of studies that I have designed, and many of these grants have been provided through various governmental agencies and organizations, including the United States Army, the National Institute of Health, the National Institute of Mental Health, and the National Science Foundation. In 1994, I, along with a number of my colleagues, was awarded a grant in excess of Three Million Dollars by the National Cable Television Association to conduct research from 1994 until 1998 with regard to the content of depictions of violence on television; this grant being part of a governmental and industry desire to assess the levels of violence on television so as to inform legislators, parents

and the industry on as to solutions regarding media violence.

6. As indicated in my current Curriculum Vitae (hereinafter "C.V."), a copy of which is attached hereto and incorporated herein by reference, I have published regularly and frequently over 125 articles in my areas of specialization. In addition, I have testified frequently as an expert witness in court and before legislative bodies, both domestic and foreign, regarding human sexuality, pornography, violence, the media, and the effects of erotic expression on human perceptions and behavior. This testimony is set forth, in detail, on pages 27-28 on my C.V., and includes testimony before the Canadian Commission on Pornography and Prostitution, various committees of the Parliament of Australia, the New Zealand Indecent Publications Tribunal, the United States Senate Judiciary Committee, and the Federal Communications Commission. I have been qualified as an expert witness in the areas of erotic expression and its effect on human perceptions and behavior in numerous courts in the United States and Canada, including but not limited to testimony in the United States District Court for the Western District of Tennessee, in the case of *United States of America v. Ellwest Stereo Theatres of Memphis, Inc., et al.*, Case Nos. 89-20254-G, 89-20255-G, and 89-20256-G, before the Honorable Julia S. Gibbons. Most recently, I testified before the United States Senate Commerce, Science and Transportation Committee on July 12, 1995 and presented testimony on the effects of mass media violence. This testimony was offered in connection with the research grant and study we are conducting concerning

television violence and development of the so-called "v-chip".

7. I regularly and on an ongoing basis, design and conduct research studies regarding the effects of mass media, the effects of certain forms of expression upon individuals and groups of people, and matters concerning the interrelationship between the mass media and social policy.

8. In June 1995, I was contacted by Bradley J. Shafer and asked to design and to conduct a study concerning the expressive message being conveyed in erotic performance dance, in order to determine what impact, if any, there was on this message by the presence or absence of nudity during such performances. In particular, we were asked to test the accuracy of the statement in *Barnes v. Indiana*, 501 U.S. 560, 571, 115 L.Ed.2d 504, __ S. Ct. ___ (1991), that "the requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic". Basically, we were asked to design and carry out a study to determine if a nudity component of certain erotic performance dance was part of the content of the message being communicated by and through such dance, as opposed to being merely the manner in which such dance was displayed, and if so, what impact, if any, on such a message there would be by precluding nudity in such dance performances.

9. With these goals in mind, my associate, Dan Linz, and I visited an erotic dance establishment, Little Darlings, in Las Vegas, Nevada, in order to familiarize ourselves with the type of dancing involved, the manner in

which it was normally performed, and to develop a conceptual format for conducting a study. Little Darlings is run by the "Deja Vu" organization, and, from what I have been told, provides the same type of performance dance entertainment as exists in other "Deja Vu" clubs around the country, including that in Nashville, Tennessee. As a result of this visit, consultations with Beth LePoire, a professor in our department who specializes in non-verbal communication, and consultations with Judith Lynne Hanna, a cultural anthropologist who specializes in the communicative aspect and content of performance dance, we designed a study that objectively measures the impact of nudity or non-nudity on the ability of an erotic entertainer to effectively convey the message of her dance.

10. In designing this experiment, we actually chose to conduct two (2) separate studies. This was done for two reasons. First, one of the studies was part of a larger study involving performance dance, a great deal of which is irrelevant to the issues here and is not discussed in the final report attached hereto. Second, two different types of studies were chosen so that we would have greater confidence in our results if, in fact, any differences were measured between the nude and non-nude conditions as a result of the responses received from the participants. The first study, which I will refer to herein and which is referred to in the attached report as "Study No. 1", is what is known as a "within subjects" design. This means that every participant would see two dancers; one who danced the performance clothed, and one who danced the performance in such a fashion that she ultimately became nude at some point. In a "within subjects" design, the participant then is able to compare the two different

performances. This first study was strictly limited to the variable of nudity. The second study, which I will refer to herein and in the attached report hereto as "Study No. 2", was designed, with regard to the variable of nudity, as a "between-subjects" design. This means that participants do not see both a performance in the nude, and a performance clothed. They simply saw the same dance performance (whether it be, randomly, nude or non-nude) at varying distances (the distance variable being related to the other portion of this study that is not relevant here). As a consequence, the participants of this second study were not afforded the opportunity to compare the same dance performance in a condition of nudity and a condition where the performer was clothed. Because of this lack of comparison, it is much more difficult to obtain results where responses are different on the basis of the variable chosen (here, nudity). Thus, when differences are observed in a between-subjects study design, this indicates that the chosen variable (here, again, nudity) has an extremely strong effect on the perceptions and attitudes of the participants, and that we can be extremely confident that the measured differences are, in fact, as a result of the study variable (i.e., nudity).

11. Attached hereto is the Final Report of the Nudity and Message Effectiveness Studies that we conducted, and I incorporate by reference the text of that report herein. The final report was prepared by myself, and my associate, Dr. Daniel Linz, and the statements and findings as contained therein are true and accurate. Below is a brief description of our study design and methodology:

a. *Study Subjects.* We determined that it was appropriate to use regular patrons of an erotic dance facility inasmuch as our goal was to measure the consequences of various controls to dance entertainment upon the intended audience of such entertainment. With a random selection of subjects, there would undoubtedly be some who found any sort of nude or erotic dance objectionable. As a consequence, their responses would reflect their distaste for the dance itself, rather than the discrete variables we were attempting to measure. By selecting club patrons, our study would not suffer from this problem.

b. *The Dance.* In viewing the establishment offered at Little Darlings, it was immediately apparent that each entertainer had her own style. In order to control for variations in style which might affect the communicative aspects of the dance, i.e., one style may be more communicative than others, it was determined that it would be necessary to choreograph a single dance so that each subject was presented with essentially the same dance, with the only variables being those that we were seeking to measure. A professional choreographer was retained to choreograph a specific dance routine and to teach it to the entertainers that we were going to use in the study. Prior to the commencement of the study, I confirmed that all of the dancers knew the choreographed dance routine and could consistently perform it. I have reviewed the dance routine that was choreographed and that was used throughout these studies, and is entirely comprised of various dance performance components that are regularly used, seen and displayed in the Little Darlings club.

c. *The Entertainers.* To the extent possible, we attempted to recruit entertainers that possessed generally the same physical characteristics. In addition, the entertainers wore identical costumes, undergarments and perfume. Out [sic] goal was to reduce "attractiveness" as a variable.

d. *Study Format.* With the cooperation of Little Darlings, we isolated an area of the club with curtains. This area was divided into four areas; an area for each of three subjects, and a waiting area for the entertainers and for our observer. When seated, a subject could not view any other subject, the entertainer performing for another subject, or the entertainer waiting area.

Nine separate entertainers were used in the study. In Study 1, two (2) entertainers appeared randomly for each set of subjects. In Study 2, three (3) entertainers appeared randomly for each set of subjects. In Study 1, one of the entertainers performed in such a fashion that she ultimately became nude, and the other entertainer maintained wearing a bra and panties. In Study 2, each entertainer performed the same dance, once for each of the three (3) subjects.[1] Each subject received three (3) dances; i.e., a dance at a distance of four (4) feet, a dance at approximately six (6) inches, and a dance at six (6) inches with a single brief touch on the cheek, shoulders and forearm.[2] Half of the time, the dances were performed in a nude condition. In this condition, the dance

[1] On occasion, only two subjects would be available. On those occasions, each subject still received three (3) dances, one from each of the three entertainers dancing in that round.

[2] As discussed above, because of the additional variable of touch, no data concerning study participants who were

started with the entertainers clothed in a dress only. During the dance, the dress was removed so the entertainer was entirely nude. The other half of the time, the dances were performed in a non-nude condition. In this condition, the entertainers wore a bra and panties under the dress which were not removed when the dress was removed. In this study, each participant would see the three performers either all nude or all non-nude.

Prior to the dances, the subjects were instructed not to talk to the entertainers. This was done in order to control for the effect of verbal communication. While the dances were being performed, we stationed an observer, Eva Blumenthal, a graduate student in our communications department, in the room where she could observe each dance. Her job was to verify that each dance was performed as choreographed and that the study rules regarding verbal communication were observed.

After the dances were completed, each subject was asked to complete a questionnaire designed to measure several attributes of the dance communication.

e. *The Questions.* The questions that were contained in our studies, relating to perceptions involving the dance performances, were derived from a number of different sources. First, we were provided with copies of the United States Supreme Court decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 115 L.Ed.2d 504 (1991), and the underlying Circuit Court of Appeals decision in

subjected to the "6-inch touch" performance is included in the report attached hereto, and my opinions as contained within this Affidavit are not based upon any such data.

Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990). These cases discuss, and in particular the concurring opinions in *Miller*, the "message", ideas, and concepts that are attempted to be conveyed and are conveyed in and by erotic performance dance. Second, as referenced above, an associate of mine, Dr. Beth LePoire, a professor in our department, specializes in non-verbal communication, and drafted a number of the questions, particularly with regard to the relational communication questions, as used in the study. Third, we received the input and advice of Dr. Judith Lynne Hanna, a cultural anthropologist, who has significant professional research experience both in dance and erotic performance dance, and who also provided to us various written materials on these subjects. After receiving the input of these professors, and my associate, Dr. Daniel Linz, we, in consultation with one another, came to a consensus opinion as to the questions to ultimately be used in these studies. In my professional opinion, from the legal decisions that I have been provided, from the research that I have conducted, from my review of the topical literature, from my previous professional experience and training, and from the input that I have received from my colleagues, the questions as contained in the two studies and as are reported on in the final report attached hereto, are all appropriate questions which measure the communicational aspects and attributes of erotic performance dance.

12. We began gathering data on Monday, August 21, 1995 and finished on August 24, 1995. The results of both of these studies are contained in the Final Report of Nudity and Message Effectiveness Studies attached hereto and incorporated herein by reference. The results

found in the final report are statistically significant, and contain the appropriate level and degree of confidence to enable me to reach certain conclusions as a result of these studies.

13. The findings as set forth in the final report are reported in terms of probability factors (i.e., "P < .05"). This is the confidence level that we would ascribe to the reported results. Thus, if the report shows a probability factor of .05 ("P < .05"), that means that we are 95% sure that the results that have been obtained are as a direct consequence of the variable as set forth in the study (i.e., nudity), as opposed to some random chance. The probability factors that we have utilized in these studies in order to determine statistical significance are the generally accepted levels in the scientific community.

14. In analyzing the data obtained, the appropriate scientific method would be to sum the responses to the various questions as are contained within the three categories of measurement (relational communication, erotic communication, and social communication), in order to come up with three separate composite scores. This is the appropriate scientific methodology to determine the statistical significance of the results obtained from these studies, and we have reported the data as such. We have also provided the statistically significant results obtained on separate individual questions as a result of a request of the attorneys involved in this matter.

15. The statistically significant results that we obtained in comparing responses in the nude versus the non-nude condition existed not only in the "within subjects" design of Study 1, but were also similarly present

in the "between-subjects" design of Study 2. This indicates to me as a psychologist that the effects of the variable of nudity upon the various aspects of expression conveyed by erotic performance dance are extremely strong, and are not the result of happenstance, random chance or other such factors.

16. The primary findings of these studies are that:

a. The relational communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by precluding the entertainer from becoming completely nude.

b. The erotic communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by precluding the entertainer from becoming completely nude.

c. The social message as expressed in erotic performance dance is significantly and substantially reduced and degraded by precluding the entertainer from becoming completely nude.

17. Based upon these findings and the results of the final report, I have reached the following conclusions which I hold in my professional opinion to a reasonable degree of scientific certainty;

a. In the context of erotic performance dance, nudity is, itself, an expressive component of the dance and not merely incidental conduct associated therewith.

b. In the context of erotic performance dance, nudity is, itself, an expressive component of the dance and not merely the manner in which such dance is performed.

c. The requirement that dance performers wear covering of their genitals, breasts and buttocks significantly and substantially deprives the dance of the relational message that is sought to be conveyed.

d. The requirement that dance performers wear covering of their genitals, breasts and buttocks significantly and substantially deprives the dance of the erotic message that is sought to be conveyed.

e. The requirement that dance performers wear covering of their genitals, breasts and buttocks significantly and substantially deprives the dance of the social message that is sought to be conveyed.

f. The requirement that dance performers wear covering of their genitals, breasts and buttocks does not simply make the message as expressed in the dance performance slightly less graphic; it actually effects and significantly alters the message being conveyed.

g. In the context of erotic performance dance, nudity is not simply a non-communicative element, but is, actually, an integral part of the content of the expression.

h. The requirement that dance performers wear covering of their genitals, breasts and buttocks are not, in the context of erotic performance dance, unrelated to the content of the expression that is sought to be communicated thereby.

i. Regulations that would require an erotic dance performer to maintain covering of her breasts, buttocks, and genitals are directed at the content of the expression as contained in erotic performance dance.

j. In the context of erotic performance dance, nudity is part and parcel of the relational, erotic, and social communication sought to be communicated thereby, and is not the mere manner of a performance or incidental conduct thereof.

k. The relational, erotic, and social communication sought to be communicated by erotic performance dance is significantly and substantially effected, reduced, and degraded by the requirement that performers refrain from exposing their breasts, buttocks, or genitals.

DATED at Santa Barbara, California, this 11th day of 9, 1995.

/s/ Edward I. Donnerstein
Edward I. Donnerstein

Subscribed and sworn to before me this 10th day of November, 1995.

/s/ Illegible
Notary Public

Harris, Texas County, California
My Commission Expires: 7-2-96

Final Report
of the
Nudity and Message Effectiveness Studies

Date: October 31, 1995

Prepared For: Shafer & Associates, P.C.
A Professional Corporation
3800 Capital City Blvd., Ste #2
Lansing, MI 48906

Prepared By: Dr. Edward Donnerstein
and Dr. Daniel Linz
Department of Communication
University of California
Santa Barbara, CA 93106

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

Anti-nudity Statutes and Erotic Expression 1

Theoretical Background 3

STUDY 1 4
METHOD 4
Subjects 4
Design 4
Materials 4
Procedure 6
RESULTS OF EXPERIMENT 1 8
Relational Communication 8
Erotic Communication 9
Social Items 10
STUDY 2 11
METHOD 11
Subjects 11
Design 11
Materials 11
Procedure 12
RESULTS OF EXPERIMENT 2 14
Relational Communication 14
Erotic Communication 15
DISCUSSION 16
REFERENCES 17
LIST OF FIGURES 18

INTRODUCTION

The purpose of this study was to determine whether the erotic, relational, and social messages conveyed by erotic dancers are significantly influenced by the variable of nudity. The first study was conducted to examine only the issue of nudity. In the second study, nudity and distance between patron and entertainer were examined as part of a larger project on erotic dance. In this report, however, we will only discuss the results as they related to nudity and those conditions which most resemble Deja Vu in the present jurisdiction. Specifically, we tested the hypotheses that: 1) partially clothed dancers would communicate a significantly *less* erotic, a *different* social message and communicate a significantly *less* intimate relational message than nude dancers. These hypotheses are pitted against the collection of "null" hypotheses offered by the plurality opinion of Chief Justice Rehnquist in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 115 L.Ed. 2D 504 (1991), which seems to imply that the erotic, social and relational message content of erotic dancing is unaffected by this variable.

BACKGROUND

Anti-nudity Statutes and Erotic Expression

Although divided as to exactly why, five members of the Supreme Court in *Barnes v. Glen Theatre* (1991) agreed that an Indiana statute prohibited nude dancing performed as entertainment did not violate the First Amendment. Chief Justice Rehnquist expressed the view that nude dancing as entertainment is expressive conduct within the outer perimeters of the First Amendment, but

application of the Indiana statute to such dancing was justified, despite the statutes incidental limitations on some expressive activity. Applying the four part *O'Brien* test (*U.S. v. O'Brien*, 391 U.S. 367, 1968), Chief Justice Rehnquist found that the Indiana anti-nudity statute was: (a) within the state's constitutional power, (b) designed to protect public morals and public order and thus furthered a substantial governmental interest, and was (c) unrelated to the suppression of free expression, in that the perceived evil that Indiana sought to address was not erotic dancing but rather public nudity. Finally, the requirement that the dancers wear at least "pasties" and a "G-string" was, in Chief Justice Rehnquist's opinion narrowly tailored to achieve the state's purpose.

Specifically with regard to part "c", The Chief Justice offered the opinion that " . . . the requirement that the dancers don pasties and G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. This conclusion is buttressed by a reference to the facts of *O'Brien*. In *O'Brien*, an act of Congress provided that anyone who knowingly destroyed a selective service registration certificate committed an offense. O'Brien burned his certificate on the steps of the South Boston Courthouse to influence others to adopt his anti-war beliefs. The Supreme Court upheld his conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the selective service system. O'Brien's deliberate destruction of his certificate frustrated this purpose and for this non-communicative

aspect of his conduct, and for nothing else, he was convicted. It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done "in the nude."

The dissenting opinion in *Barnes* concurred with the Seventh Circuit Court of Appeals which had earlier ruled the Indiana ordinance unconstitutional, finding that nude dancing conveyed a "message of temptation and allurement" that was protected by the First Amendment. The dissent noted that in arriving at its decision, the Plurality had conceded that nude dancing conveys an erotic message, and concluded that the message would be muted if dancers were required to wear pasties and G-strings. The dissent asserted that " . . . the emotional or erotic impact of the dance is intensified by the nudity of the performers . . . the nudity of the dancer is an integral part of the emotions and thought that a nude dancing performance evokes. The sight of a fully clothed, or even partially clothed dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed."

Theoretical Background

Nudity. Social psychological and communication theory would suggest that contrary to Chief Justice Rehnquist's assertions in *Barnes*, nudity will influence

judgements and attitudes among those who view an erotic dance. Nude photographs are rated as more "erotic" by viewers and greater attention is paid to the nude than clothed actor, and cognitions about sex and pleasure are stimulated in the viewer which are reinforcing under conditions of nudity. The message of eroticism is considered to be higher.

Social messages are also conveyed by nudity. Nudity may convey a social message that women can express themselves as freely as men or that the female body is beautiful. In art, the naked form is presupposed to be beautiful. Nakedness has been traditionally associated with freedom in our culture. Recently, the argument has been made that women should be free to express their sexuality. Nudity could symbolize these messages.

Relational messages should also be affected. Nudity should make a difference in areas like expressing intimacy, liking, and desire because of sensory involvement and changed expectations about behavior among the interaction participants. These cues and expectations influence how we perceive and provide a frame of reference for interpreting the communication.

The language of the questions asked participants in this study was drafted so as to be both scientifically sound and consistent with legal definitions applicable to the law in this case. In deciding the types of questions to, we relied upon decisions in *Barnes* and in *Miller v. Civil City of South Bend*, 904 F2d 1081, 1089 (7th Cir. 1990), as well as psychological and communication theory. For example, using Miller we selected the question asking if

the dancer's dance was "alluring with a message of temptation" (*Miller v. Civil City of South Bend*, 904 F2d 1081, 1089 (7th Cir. 1990). Experts in dance (Professor Judith Hanna) and relational communication (Dr. Beth LePoire) were consulted for advice on other questions.

STUDY I

METHOD

Subjects

Twenty male patrons of the Little Darlings dance club of Las Vegas were recruited for participation in the study.

Design

A two-level, within subjects design (dancer nude v. dancer partially clothed), was employed. Patrons viewed two dancers in random order.

Materials

Consent form. Participants were asked to read and sign a consent form which read as follows:

> This is to acknowledge that I have been informed that I will be asked to view three adult entertainment dances. Each dance will last approximately 3 minutes. I understand that these dances may involve nudity. I also understand that during the three dances **I am not to talk to the dancers** and while performing the dancers will not talk to me except to introduce themselves. I also understand that **I am not allowed to touch any of the dancers**. I further

understand that I will be asked to complete a short questionnaire before I see the dances and one or more short questionnaires after I have seen the dances. **Your Participation in this study and any answers which you give will be completely *confidential*.** I understand that if I have any problems during the study I am to contact any one of the staff personnel who will answer any questions or address any concerns I may have. **I understand that for my participation, which will last approximately 20 minutes, I will be provided a Deja Vu VIP Card which can be used at Deja Vu clubs nationwide.** My signature below indicates that I have freely volunteered for this dance evaluation and understand what I will be asked to do during this evaluation.

Pre-dance questionnaire. Before viewing the erotic dance, participants completed a questionnaire which asked them to report: 1) Business or a personal relationship with anyone that worked in this Little Darling's establishment, Deja Vu dance clubs across the country, or with anyone in the exotic dance industry; 2) If they had heard anything about this study or the specific questions asked; 3) Whether that [sic] had previously visited this Little Darlings club or any club where nude or exotic dancing is offered; and 4) Employment in any capacity in law enforcement. If the participant answered YES to questions 1, 2 or 4, they were to be deleted from the study. No participants answered YES. In addition, demographic information including, age, race, religiosity, marital status, income, political orientation (Conservative-Liberal), and level of education was requested of the participant.

Post-dance questionnaire. After viewing the dances, the participants completed a questionnaire which contained the following items relevant to this study measuring relational, erotic and social communication.
1. Relational communication. "Did you feel that the dancer was expressing to you through her dance the fantasy that: (a) She wanted to make you feel like you were a special person? (b) She liked you? (c) She was personally interested in you? (d) She desired you? (e) There was intimacy between the two of you? (f) She wanted to be romantically involved with you?"

2. Erotic communication. "The Dancer's dance was: (a) Passionate. (b) Artistic. (c) Sexy. (d) Erotic. (e) Alluring with a message of temptation. (f) Seductive. (g) Stimulating. (h) Personal."

3. Social message. "Did the dancer express to you that: (a) Women can express themselves as freely as men? (b) She was free to do what she wanted with her body? (c) The female body is beautiful?"

Each question subcomponent was followed by a "Definitely Yes" to "Definitely No" response scale anchored by the numbers 1 and 8. The were also asked if they had ever had a private one on one dance with this entertainer? If they answered YES they were to be eliminated from the analysis. No subjects answered YES.

Procedure

The study was conducted at the Little Darlings dance club, Las Vegas, Nevada. Participants visiting the club between 12:00pm and 9:00pm during the week of August

19-23, 1995, were randomly recruited to watch two dances. The recruitment was done by Dr. Dale Kunkel and/or Mr. Tim Gray of the University of California-Santa Barbara. The solicitation of participants used the following outline:

> Hello. My name is _____. I work for a research company that has been hired by the club to study how people react to several different types of dances that they might want to use in the club. We are recruiting participants for the study right now. We need people who are willing to watch two dances we are evaluating. Each dance will be done privately for you by a different woman. After you have seen each dancer, you will then be asked to fill out a questionnaire that tells us what you think about each of the dances. If you are willing to participate, I can offer you a VIP card which allows free admission to any Deja Vu club. It will only take about 15-20 minutes to complete the study. Would you like to do this?

After being recruited, two participants at a time were taken to a closed off room in the back of the main club area where they read and signed the Consent form. They were then provided the following instructions about the completion of the Pre-dance questionnaire:

> Before we have you view the dances, we need you to answer a few questions about yourself. All of the information you provide is confidential and fully anonymous. It will never be examined individually. We are interested only in the overall reactions of large groups of people. Please complete this questionnaire and return it to me when you've finished. Let me know if you have any questions. Once you're finished, it will just be a short wait before we begin the dances.

After completing the form, the two participants were taken to an adjoining room where they were to watch the dances. The participants were separated from each other by a partition. Once seated, they were given the following instructions:

> We are going to show you two dances. Each one will be presented by a different performer. It is important that you *do not talk to or touch* any of the dancers. There will be a brief pause between each dance. Please stay seated until the second dance has been completed. Do not offer the dancers any tips or money. Afterwards, I will give you a questionnaire that asks you how you felt about each of the dances. Remember that we are interested in getting your reaction to each dance that you see. We are not trying to evaluate the women who are dancing. Nothing that you tell us will be used to affect a dancer in any way. Once you have completed the questionnaire, I will give you the special VIP card for future admission to any Deja Vu dance club as our thanks for your help.

Participants then viewed two dancers performing; one nude and one non-nude dance. Each dance was 3 minutes in length. The dance routine and the music accompanying the dance were held constant across the nude and non-nude conditions. It is important to note that except for the nude vs non-nude part of the dance, all other aspects of the dance were identical (e.g., same shoes, costume, perfume, distance, lighting, music, etc.). The dancers were trained by a professional dance choreographer so as to assure that each dance was identical except for the condition of nudity. All dancers began their routine with a black dress which was removed within

seconds of the beginning dance. Dancers in the non-nude condition were clothed in a bra and panty, while those in nude condition did not wear these items of clothing. Eight dancers were randomly assigned to the nude and not nude conditions. The dancer in any one sequence would perform nude (or non-nude) for one participant and then move over to the next participant to perform the same dance. In a following sequence the same dancer would perform non-nude (or nude). In order to assure that the dancers were performing the correct routine, Ms. Eva Blumenthal of the University of California-Santa Barbara coordinated the schedules of the dancers and observed all performances.

After viewing the dances, the participants were taken back to the adjoining room where they had completed the earlier consent form. They were given the Post-dance questionnaire by Dr. Kunkel and Mr. Tim Gray which contained a picture of each of the dancers they had seen. Dr. Kunkel and Mr. Gray explained how to complete the questionnaire and answered any questions the participant had. Subjects were separated in distance in order that they could not view each others responses. Upon completion of the questionnaire, the participant was thanked for their participation and presented the VIP card.

RESULTS OF EXPERIMENT I

Relational Communication. There were six items which comprised the Relational Communication questions. The question and items were as follows:

Did you feel that the dancer was expressing to you through her dance the fantasy that:

1. She wanted to make you feel like you were a special person?
2. She liked you?
3. She was personally interested in you?
4. She desired you?
5. There was intimacy between the two of you?
6. She wanted to be romantically involved with you?

These six items were summed to form a composite measure for *Relational Communication*. A t test (Nude vs Not Nude) on the *Relational Communication* measure revealed a significant effect for Nudity ($p<.005$), with Nude dancers being rated as more generally expressive overall than their Non Nude counterparts. These results are displayed in **Figure 1.**

Individual analysis on each of the six items showed significant effects on the following questions:

a. She wanted to make you feel like you were a special person ($p<.05$)

b. She liked you ($p<.01$)

c. She was personally interested in you ($p<.01$)

d. There was intimacy between the two of you ($p<.05$)

e. She wanted to be romantically involved with you ($p<.06$)

These results are displayed in **Figure 2.** In all cases, Nude dancers were rated more expressive on each of these items than Non Nude dancers. The remaining item, while

not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

Erotic Communication. There were eight items which comprised the *Erotic Communication* questions. The question and items were as follows:

The Dancer's dance was:

1. Passionate
2. Artistic
3. Sexy
4. Erotic
5. Alluring with a message of temptation
6. Seductive
7. Stimulating
8. Personal

These eight items were summed to form a composite measure for *Erotic Communication*. A t test (Nude vs Not Nude) on the *Erotic Communication* measure revealed a significant effect for Nudity ($p<.03$), with Nude dancers being much more erotic overall than their Non Nude counterparts. These results are displayed in **Figure 1.**

Individual analysis on each of the eight items showed significant effects on the following questions:

a. Erotic ($p<.01$)

b. Alluring with a message of temptation ($p<.05$)

c. Stimulating ($p<.01$)

These results are displayed in **Figure 3.** In all cases, Nude dancers were rated much more expressive on each of these items than Non Nude dancers. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

Social Items. Three additional questions were asked in this study. They were: Did the dancer express to you that:

1. Women can express themselves as freely as men?
2. She was free to do what she wanted with her body?
3. The female body is beautiful?

These three items were summed to form a composite measure for *Social Communication*. A t test (Nude vs Not Nude) on the *Social Items* measure revealed a significant effect for Nudity ($p<.04$), with Nude dancers being rated as more generally expressing these social communication points than their Non Nude counterparts. These results are displayed in **Figure 1**.

Individual analysis on each of the items showed the following significant effects:

a. Women can express themselves as freely as men ($p<.05$)

b. She was free to do what she wanted with her body ($p<.06$)

Nude dancers received a higher agreement score than Non Nude dancers on each of these items. This result is presented in **Figure 4.** The remaining item, while not

statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

STUDY 2

METHOD

Subjects

Thirty male participants in the Little Darlings dance club of Las Vegas who had been recruited for participation in a larger study involving other (besides nudity) aspects of performance dance fell within the categories relevant for this limited study of the effects of nudity.

Design

A 2 X 3 mixed, within-subjects and between-subjects factorial design was employed. The within subjects variable was distance from participant (4 feet, 6 inches, or 6 inches with touch[1]).

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[1] The present study will only analyze the results for the 4 foot and 6 inch condition. The 6 inch touch condition was examined for a larger study as part of this project. The touch condition is another variable of interest in performance dance, but is not of concern in the present case. Given that the participants viewed the dances in random order, it is methodologically and statistically appropriate to exclude the 6 inch touch condition from our analysis. We should note that the effects of nudity on all measures would actually be significantly stronger had the touch condition been included in the analysis.

The two between-subjects variables were nudity (dancer nude or non-nude).

Materials

Consent form. Participants were asked to read and sign a consent form like that of Study 1.

Questionnaires. Pre- and post-dance questions were identical to Study 1, with the exception of Social Message questions.[2]

Procedure

The study was conducted at the Little Darlings dance club, Las Vegas, Nevada. Participants were recruited in a manner similar to that of Study I by Dr. Kunkel and Mr. Gray between 12:00pm and 9:00pm during the week of August 19-23, 1995. For this study 3 participants at a time were recruited.

After being recruited, the participants were taken to a closed off room in the back of the main club area where they read and signed the Consent form. They were then provided the instructions about the completion of the Pre-dance questionnaire as were used in Study 1.

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[2] Study 2 was conducted prior to Study 1. It was a larger study which was interested in other variables (distance, lighting) not at issue in the present case. Upon the completion of this larger study, a smaller study concerned only with nudity (Study 1) was conducted. The researchers decided to add the Social Communication questions to this smaller study. Consequently, they are not part of the present study and analysis.

After completing the form, the participants were taken to an adjoining room where they were to watch the dances. The participants were separated from each other by a partition. Once seated, they were given the following instructions:

> We are going to show you three dances. Each one will be presented by a different performer. It is important that you *do not talk to or touch* any of the dancers. There will be a brief pause between each dance. Please stay seated until the last dance has been completed. Do not offer the dancers any tips or money. Afterwards, I will give you a questionnaire that asks you how you felt about each of the dances. Remember that we are interested in getting your reaction to each dance that you see. We are not trying to evaluate the women who are dancing. Nothing that you tell us will be used to affect a dancer in any way. Once you have completed the questionnaire, I will give you the special VIP card for future admission to any Deja Vu dance club as our thanks for your help.

Participants then viewed the three dances, one at a time, in random order. Eight dancers were employed and randomly assigned three at a time to distance conditions. The dance routine and the music accompanying the dance were held constant except for variations in distance. The dancers were trained by a professional choreographer to perform exactly the same routine at each distance, save a brief touch to the shoulders and arms under the 6 inch touch distance (see footnote 1). During any one sequence of three dances, all the dancers performed either Nude or Non-nude. The Nudity condition was reversed for the next sequence. Each dance was 3

minutes in length. As in Study 1, all aspects of the dance were identical (e.g., same shoes, costumes, perfume, distance, lighting, music, etc.) except for the distance from the participant and the variable of nudity. All dancers began their routine with a black dress which was removed within seconds of the dance commencing. Dancers in the non-nude condition were clothed in a bra and panty, while those in nude condition did not wear these items of clothing. In order to assure that the dancers were performing the correct routine, Ms. Eva Blumenthal of the University of Califomia-Santa Barbara coordinated the schedules of the dancers and observed all performances.

After viewing the dances, the participants were taken back to the adjoining room where they had completed the earlier consent form. They were given the Post-dance questionnaire by Dr. Kunkel and Mr. Tim Gray, which contained a picture of each of the dancers they had seen. They were also asked if they had ever had a private one on one dance with this entertainer. If they answered YES they were to be eliminated from the analysis (2 participants did answer Yes and their responses are not included). Dr. Kunkel and Mr. Gray explained how to complete the questionnaire and answered any questions the participant had. Subjects were separated in distance in order that they could not view each others responses. Upon completion of the questionnaire, the participant was thanked for their participation and presented the VIP card.

RESULTS OF EXPERIMENT 2

Relational Communication. There were six items which comprised the *Relational Communication* questions. The question and items were as follows: Did you feel that the dancer was expressing to you through her dance the fantasy that:

1. She wanted to make you feel like you were a special person?
2. She liked you?
3. She was personally interested in you?
4. She desired you?
5. There was intimacy between the two of you?
6. She wanted to be romantically involved with you?

Subjects responses were summed to form one composite score on *Relational Communication* and subjected to a 2 x 2 Analysis of Variance (ANOVA) with Nudity (Nude vs Not Nude), and Distance (4 feet vs 6 inches) as factors. The analysis revealed significant effects for *Nudity* ($p<.03$) and *Distance* ($p<.01$). There were no significant interactions, indicating that Nudity by itself had a significant impact on the effectiveness of *Relational Communication,* with Nude dancers being rated more expressive overall than their Non Nude counterparts. These results are presented in **Figure 5.**

Individual analysis on each of the six items showed significant effects for Nudity on the following questions (there were no Nudity x Distance interactions):

a. She wanted to make you feel like you were a special person ($p<.03$)

b. She was personally interested in you ($p<.05$)

c. She desired you ($p<.02$)

d. She wanted to be romantically involved with you ($p<.05$)

These results are displayed in **Figure 6.** In all of these cases Nude dancers were rated more expressive than Non Nude dancers. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

Erotic Communication. There were eight item [sic] which comprised the *Erotic Communication* questions. The question and items were as follows: The Dancer's dance was:

1. Passionate
2. Artistic
3. Sexy
4. Erotic
5. Alluring with a message of temptation
6. Seductive
7. Stimulating
8. Personal

These eight items were summed to form one composite score on *Erotic Communication* and subjected to a 2 x 3 ANOVA with Nudity (Nude vs Not Nude) and Distance

(4 feet vs 6 inches) as factors. The analysis revealed a significant effects [sic] for Nudity ($p<.02$). There were no interaction effects. Results showed that Nude dancers were rated as much more significantly erotic overall than their Non Nude counterparts. These results are displayed in **Figure 5**.

Individual analysis on each of the eight items showed significant effects for Nudity on the following questions (there were no Nudity x Distance interactions):

a. Passion ($p<.02$)

b. Artistic ($p<.06$)

c. Erotic ($p<.01$)

d. Alluring with a message of temptation ($p<.04$)

e. Stimulating ($p<.06$)

These results are displayed in **Figure 7**. In all of these cases, Nude dancers were rated more expressive on [sic] than Non Nude dancers. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant (except for Personal).

DISCUSSION

Governmental restrictions on nudity, when applied to the context of erotic performance dance, are not merely time, place and manner restrictions that have no impact on the content of speech. Nudity is, itself, a part of the communication expressed in erotic performance dance. These restrictions are related to the content of erotic

performance dance expression, and significantly and substantially alter the content of the message being conveyed by the performer and the meaning ascribed to the dance by the viewer. Significant and substantial changes in the erotic message, relational message, and social messages of erotic performance dance is noted when the entertainers refrain from exposing their breasts, genitals, and buttocks. The present studies strongly demonstrated that the effectiveness of the communication as contained in a dancer's performance was significantly altered by the condition of nude vs. Non-nude. Overall, nude dancers were seen as expressing a significantly stronger relational, erotic, and social message than non-nude dancers. There is no question from these studies that the effectiveness and content of these messages are significantly impacted by nudity of the law thereof.

REFERENCES

Barnes v. Glen Theatre, 501 U.S. ___, 115 L.Ed.2d 504, 511, 514 (1991)

Miller v. Civil City of South Bend, 904 F2d 1081, 1089 (7th Cir. 1990)

O'Day et al. v. King County, 1988

U.S. v. O'Brien, 1968

LIST OF FIGURES

Figure 1: Effect of Nudity on Combined Communication Scales – Study 1

Figure 2: Effect of Nudity on Relational Communication Items – Study 1

Figure 3: Effect of Nudity on Erotic Communication Items – Study 1

Figure 4: Effect of Nudity on Social Communication Items – Study 1

Figure 5: Effect of Nudity on Combined Communication Scales – Study 2

Figure 6: Effect of Nudity on Relational Communication Items – Study 2

Figure 7: Effect of Nudity on Erotic Communication Items – Study 2

Figure 1

Effect of Nudity on Combined Communication Scales

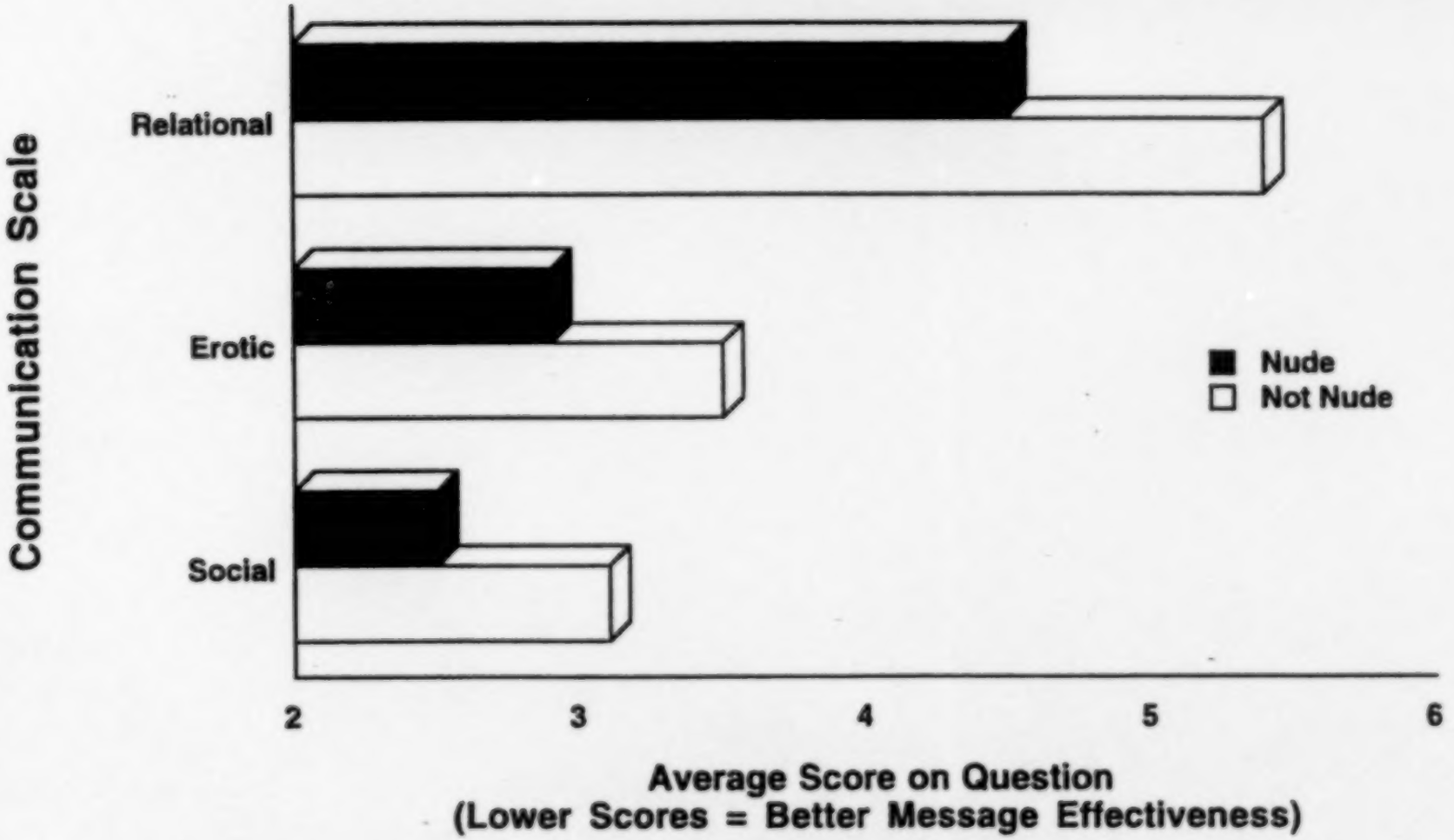


Figure 2

Effect of Nudity on Relational Communication Items

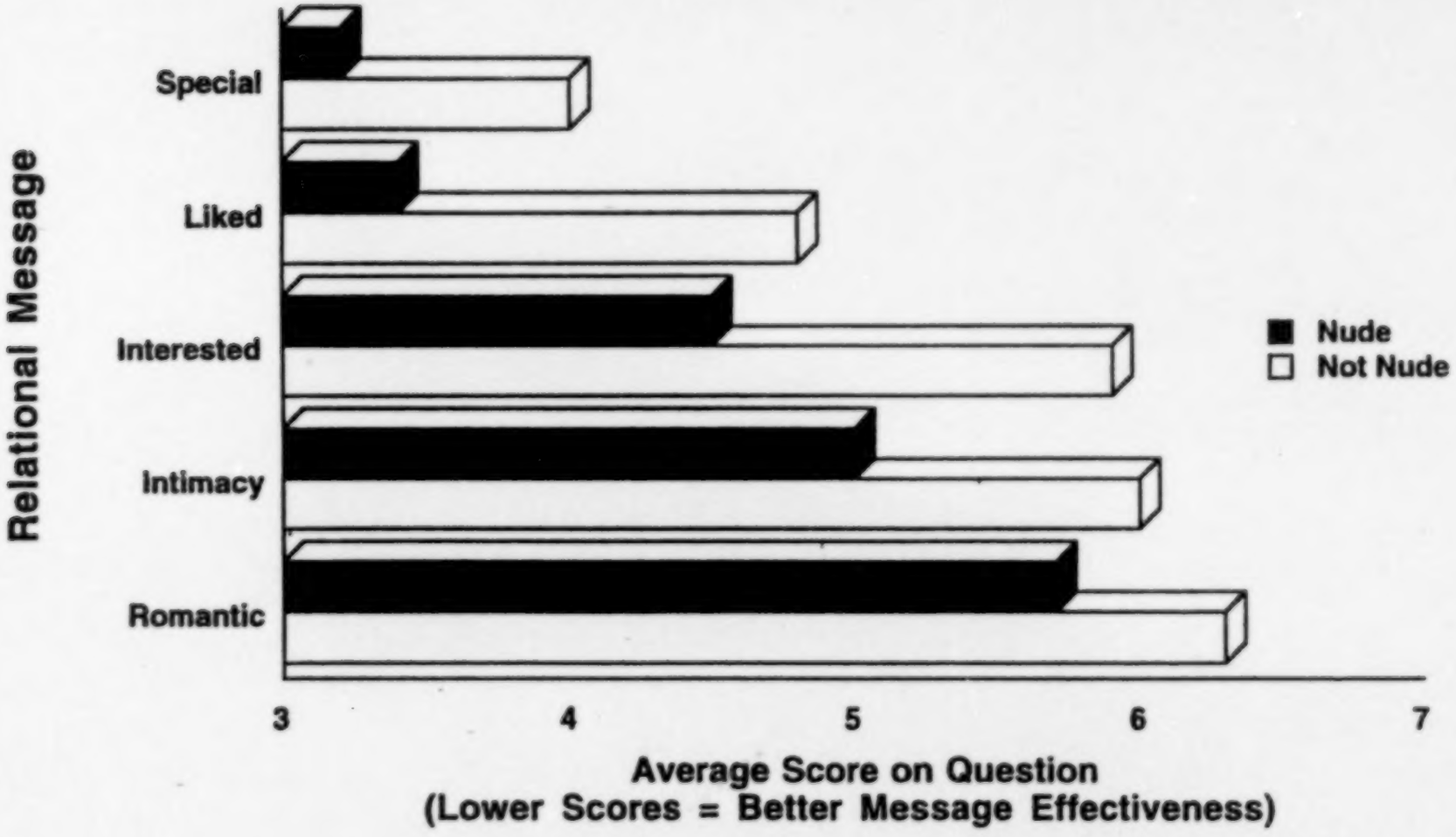


Figure 3

Effect of Nudity on Erotic Communication Items

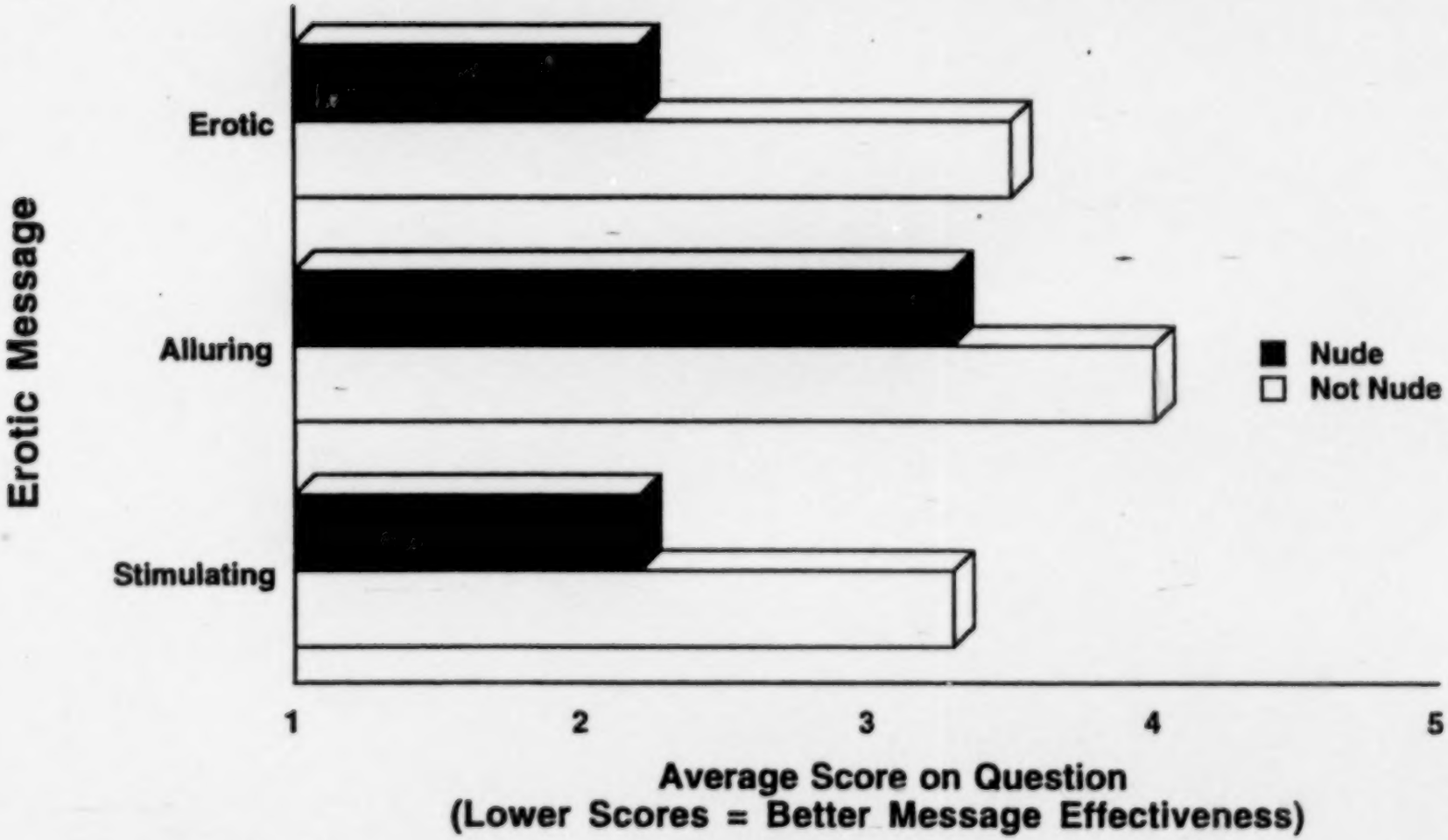


Figure 4

Effect of Nudity on Social Communication Items

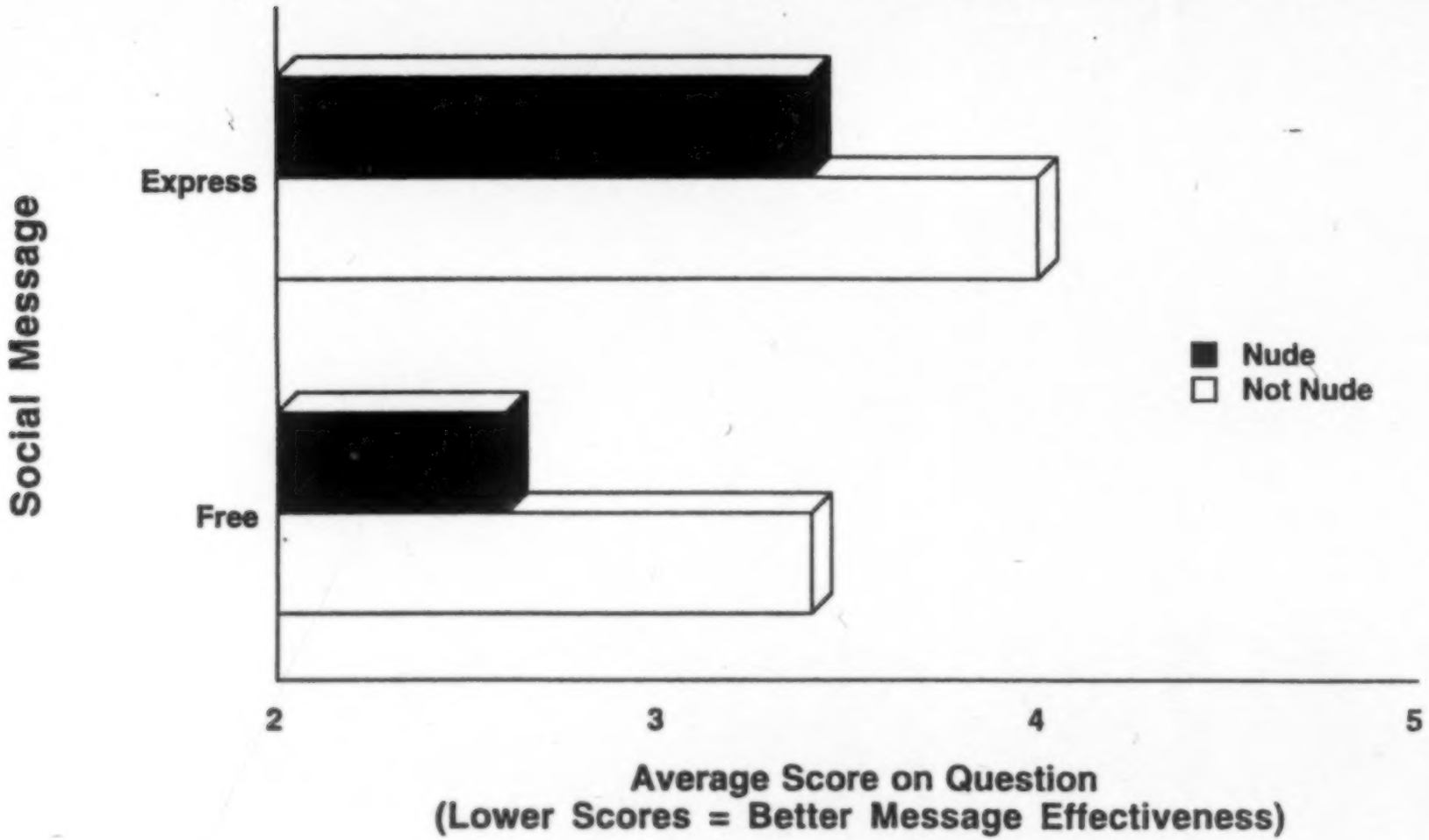


Figure 5

Effect of Nudity on Combined Communication Scales

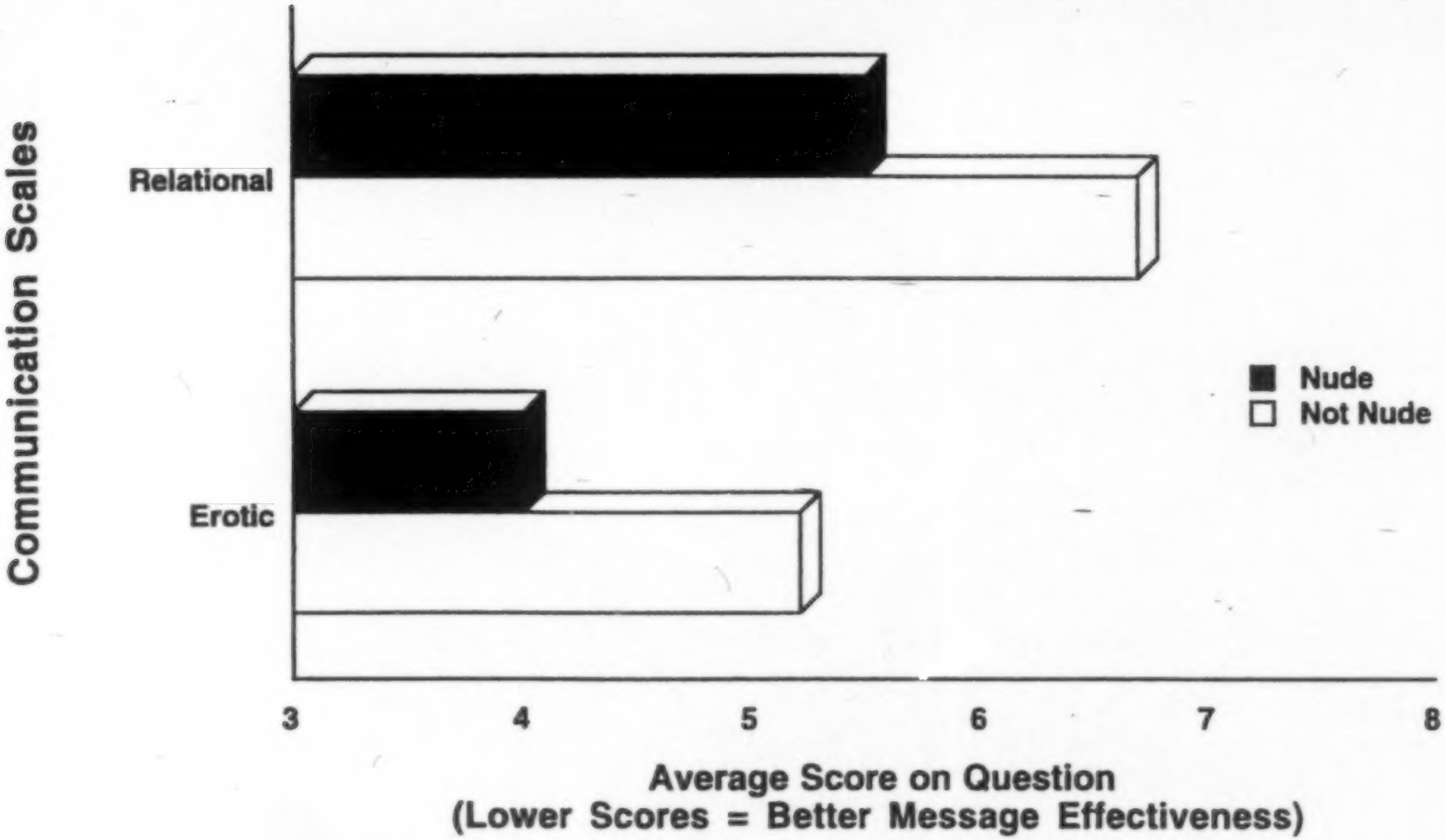


Figure 6

Effect of Nudity on Relational Communication Items

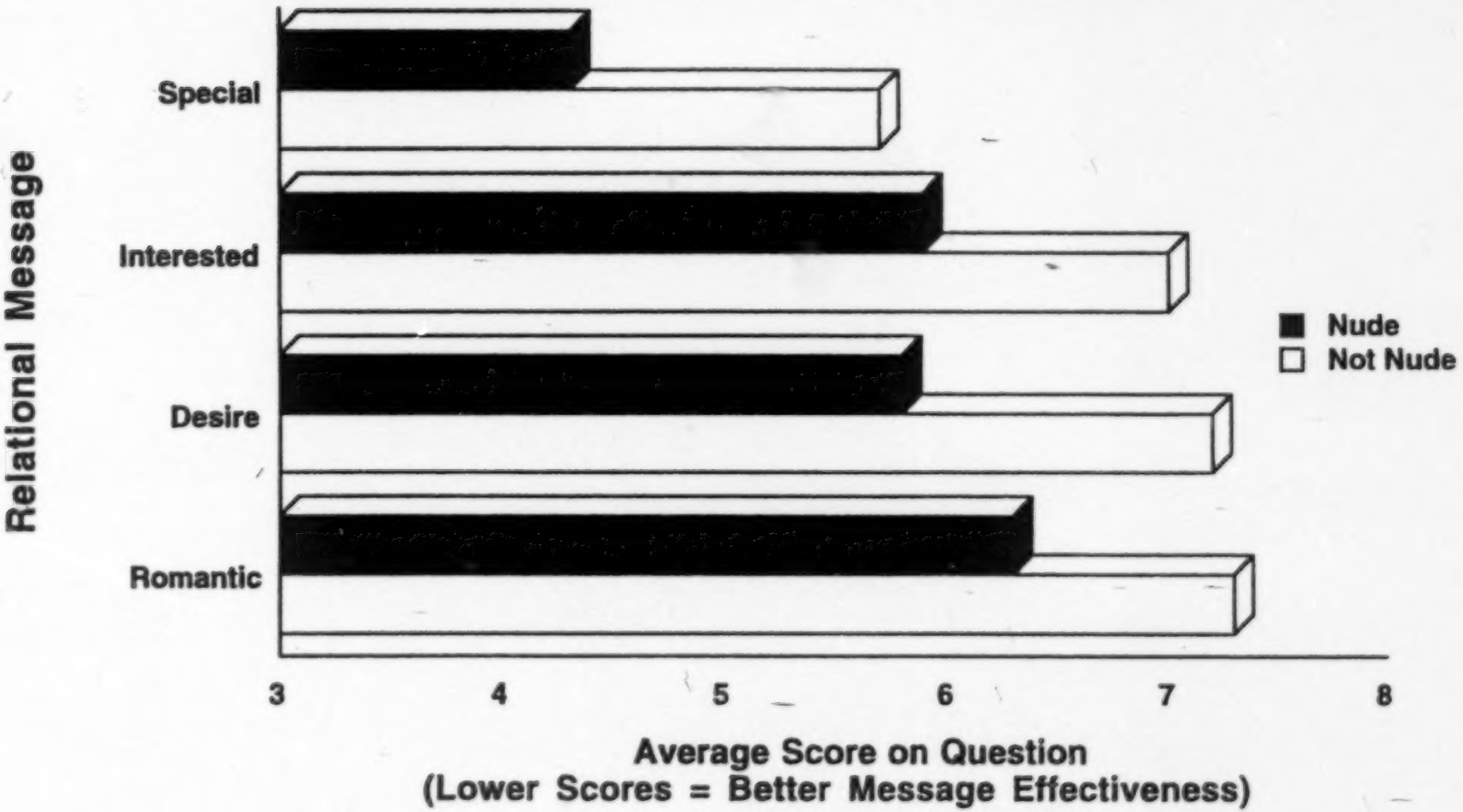
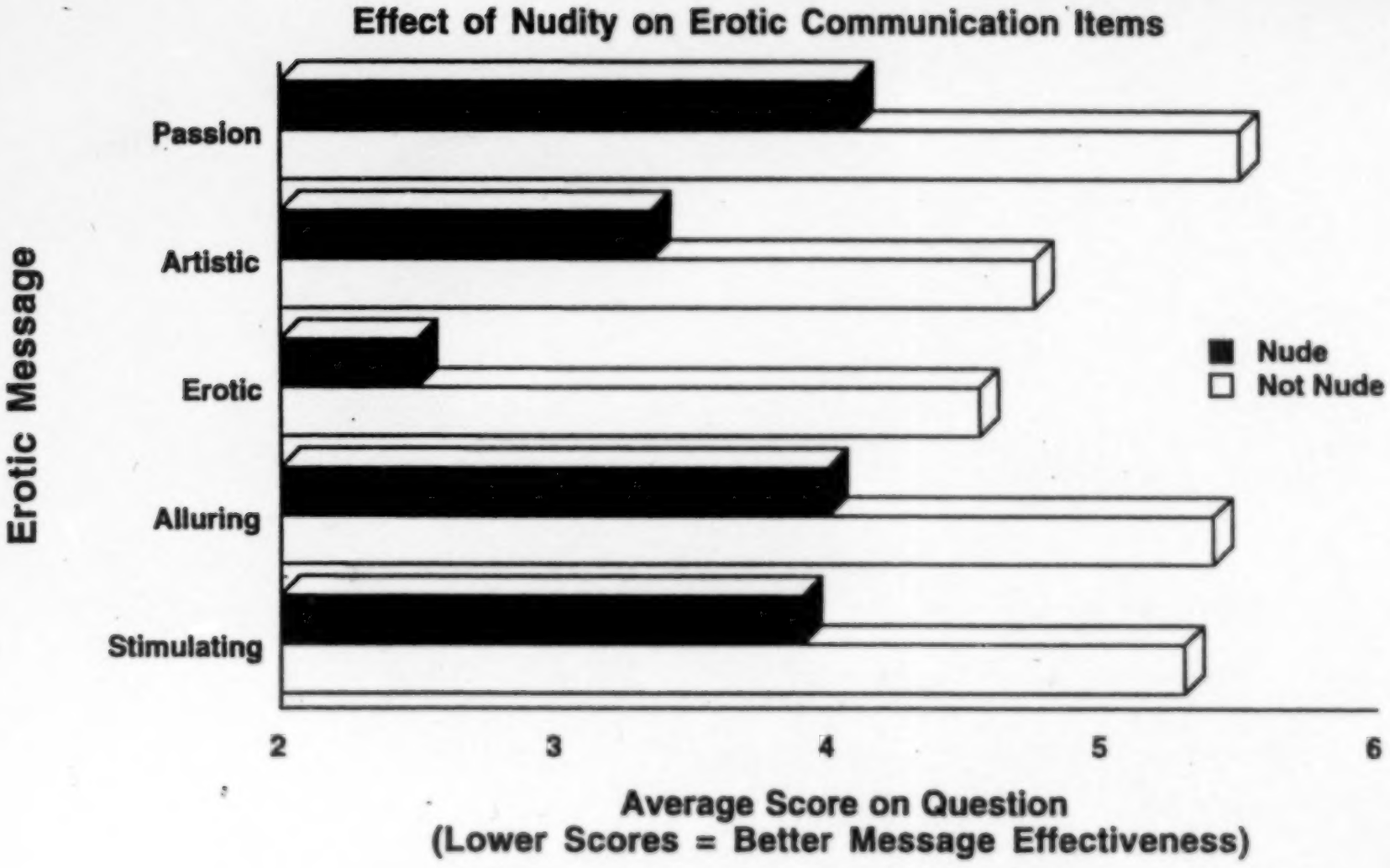


Figure 7


Effect of Nudity on Erotic Communication Items
Erotic Message
Passion
Artistic
Erotic
Alluring
Stimulating
Nude
Not Nude
2
3
4
5
6
Average Score on Question
(Lower Scores = Better Message Effectiveness)